IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2008 Session

DEON DEVALL OWENSBY v. VANESSA DAVIS
IN THE MATTER OF K. O.

Appeal from the Juvenile Court for Davidson County
No. 2005-000-662 Max D. Fagan, Special Judge

No. M2007-01262-COA-R3-JV - Filed July 31, 2008

The father of the parties' minor child appeals the denial of his petition to reduce his child support obligation after losing his job. Father is licensed to practice law in Tennessee and possesses a Master's Degree in Business Administration. He was employed by a law firm earning $46,000 when child support was initially set in 2005. His employment with the law firm was involuntarily terminated the following year. After losing his job, he filed a petition to reduce his child support obligation. The trial court denied the petition finding that he was voluntarily underemployed. On appeal, Father challenges numerous aspects of the trial court's decision; however, the primary issue is whether the father was voluntarily underemployed. Finding that the evidence does not preponderate against the trial court's finding of voluntary underemployment, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Deon D. Owensby, Nashville, Tennessee, Pro Se.

Fannie J. Harris, Nashville, Tennessee, for the appellee, Vanessa Davis.

OPINION

Deon Owensby ("Father") and Vanessa Davis ("Mother") are the parents of a child born in 1998. The parties relationship deteriorated over the next few years. By 2005, the parties were separated, and Mother was denying Father any significant visitation with their child. As a consequence, Father filed a petition seeking custody of the child or, in the alternative, visitation.[1]

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[1] Because Father's parentage had not been established, the juvenile court treated the petition as a "Petition for Parentage." Following a hearing, the court established Father's parentage, awarded him visitation and set child support.

In August of 2005, the Juvenile Court Referee conducted a hearing on the petition, following which the referee entered an order designating Mother as the primary residential parent, setting a visitation schedule wherein Father was awarded approximately 90 days annually, mostly in the summer and on holidays, and setting child support in the amount of $539 per month based on Father's annual income of $46,000 and the visitation schedule.

The following year, the law firm of Michael Ponce, for which Father had been working as an attorney, terminated his employment. Thereafter, Father fell behind in his child support payments, which prompted Mother to file a petition for contempt on May 26, 2006. On June 6, 2006, Father filed the petition at issue in this appeal to modify or suspend his child support obligations. The special referee denied Father's petition and assessed court costs and Mother's attorney's fees against him. Father appealed the special referee's ruling to the Juvenile Court Judge. Special Judge Max Fagan, who was appointed to hear the case, conducted a trial on the matter on April 13, 2007.

Father represented himself at trial. Mother was represented by counsel. Father took the witness stand to testify on his own behalf; however, he did not call any witnesses and he did not present any other evidence to support his testimony. Mother's counsel conducted a thorough cross examination of Father. When Father closed his case in chief, Mother's counsel advised the court that she would not present any evidence other than that elicited during the cross examination of Father. Thus, the only evidence introduced at trial came through Father's testimony.

The following is a summary of that evidence. Father has a law degree and a license to practice law in Tennessee, a Master's Degree in Business Administration, and specialized training in nuclear, biological and chemical warfare which he received during his previous military service. He had been employed by the law firm of Michael Ponce earning approximately $46,000 annually when child support was initially established in 2005. After the law firm terminated his employment in 2006, Father looked for employment; however, his efforts could not be described as aggressive. He testified that he interviewed with one law firm and the hiring attorney informed him that the firm wanted to hire him, but they had to wait. He additionally sent out letters looking for part-time employment, such as night auditing and tax preparation, which he had experience doing. Father testified that he looked for a teaching position but never submitted an application. His job search primarily consisted of mailing out letters to potential employers and waiting to hear back from them.

Following the termination of his employment with the law firm in 2005, Father has engaged in a solo practice of law, and most of his clients have resulted from court-appointed cases. At the time of trial in April of 2006, Father testified that he was earning approximately $1,700 per month, which equates to $20,400 per year. Father admitted that he had failed to remain current with his child support obligations and was approximately $5,800 in arrears at the time of trial.

As for the amount of time he spends with his child, Father testified that his parenting time includes spring break, alternating holidays, and eight weeks in the summer, which totals approximately ninety days of parenting time per year. It was undisputed that Father's child support obligation was based in part on this visitation schedule.

At the conclusion of the trial, the juvenile court judge denied Father's petition for modification of child support finding in pertinent part that Mother had met her burden of proof to demonstrate that Father was underemployed.[2] The trial court provided a lengthy explanation for its ruling on the issue of voluntary underemployment of which the following is the most pertinent:

> On the issue of carrying the burden as it relates to whether or not [Father] is unemployed or underemployed, I believe that [Mother], through counsel, has indeed demonstrated that [Father] is underemployed. His testimony, which is the only proof that we have, but it's proof, is that he's earning $1,700 a month. That's equivalent to $9.82 an hour, or an annual income of $20,400 annually. The Child Support Income Shares Guidelines sets imputed income for persons with no showing of education or background in the $30,000 range, so we're at two-thirds of what the imputed income would be if we accept that. [Father] has a law degree, he has a Master's degree in business education, he has significant technical training through the military, he's an articulate young man, and I think certainly would be capable of earning an income in the range of $45,000, which is the amount upon which the prior income was set.
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> And so as much, I do not find that there's a basis to modify the prior order of support, and I will leave the amount of $539.00 per month as the same amount as previously set. I don't find that a modification has been substantiated by the proof.

Father appeals, contending the trial court erred by: (1) applying the improper test when determining whether a modification in child support was proper; (2) determining that Mother had carried her burden to prove that Father was underemployed through cross-examination of Father; (3) ruling that Father was not entitled to have his child support obligation suspended or reduced after presenting evidence of his involuntary termination of employment, his attempts to obtain employment, and his decision to practice law as a solo practitioner; and (4) refusing to suspend or reduce Father's child support obligation during the summer months when the child was with him.[3]

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[2] The trial court did not use the word "voluntarily" but from the court's language in the order and from the bench, it is clear that the court found that he was voluntarily underemployed.

[3] Father raised five issues on appeal; however, he waived the fifth issue in his reply brief.

STANDARD OF REVIEW

We review the record *de novo* with a presumption that the court's factual findings are correct, absent a showing that the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *see Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000)*; Farrar v. Farrar*, 553 S.W.2d 741, 743 (Tenn. 1977). It is also well settled that the burden rests upon petitioner to prove a significant variance between the obligation applicable to his alleged current income and the original child support obligation. *Turner v. Turner*, 919 S.W.2d 340, 345 (Tenn. Ct. App. 1995). Broad discretion is afforded the trial court in its child support determinations. That discretion is bounded on all sides by the child support guidelines and should not be disturbed on appeal unless this Court finds in its *de novo* review that the evidence preponderates against that finding. *See Butler v. Butler*, 680 S.W.2d 467 (Tenn. Ct. App. 1984).

ANALYSIS

Application of the Proper Standard

Father first contends that the trial court erred in applying a "change of circumstances" test instead of the "significant variance" standard. Father, however, failed to cite to the record where the court allegedly applied the change of circumstances standard to determine whether he was entitled to a reduction in child support. Moreover, we find no indication that the court applied the wrong standard.

The proper inquiry in a petition to modify child support is whether there is a "significant variance" between the current obligation and the obligation set by the Guidelines.[4] *Kaplan v. Bugalla*, 188 S.W.3d 632, 637 (Tenn. 2006); *Huntley v. Huntley*, 61 S.W.3d 329, 335 (Tenn. Ct. App. 2001). It is undisputed that Father's income is significantly less than it was when child support was originally set. Thus, Father established that there was a significance variance; however, that fact is not dispositive of the issue on appeal. This is because Father's entitlement to a modification of his support obligation pursuant to the significant variance test may be negated by a finding of voluntary underemployment. *See Kaplan v. Bugalla*, No. M2006-02413-COA-R3-CV, 2007 WL 4117787, at *4 (Tenn. Ct. App. Nov. 16, 2007). The trial court found that Father was not entitled to a reduction in his child support obligations because he was voluntarily underemployed, and the evidence in the record does not preponderate against this finding. Therefore, we find this issue is without merit.

[4]The "significant variance" standard replaced the "substantial and material change in circumstances" standard previously applied to cases involving modification of child support, *Turner v. Turner*, 919 S.W.2d 340, 342-43 (Tenn. Ct. App. 1995); however, the "substantial and material change in circumstances" standard still applies in cases involving a modification of alimony. *See* Tenn. Code Ann. § 36-5-121 (2005).

Proving a Case Through Cross-Examination

Father contends that Mother failed to carry her burden to prove that Father was voluntarily underemployed. Specifically, he presents the novel argument that Mother could not rely on his testimony because it was presented during his case-in-chief. Instead, he contends, without citing any authority to support his contention, that the evidence had to be presented in her case-in-chief. As Father explained his novel theory at oral argument, Mother had to call him as a witness in her case-in-chief and ask the same questions her counsel had asked on cross-examination of Father to prove that he was voluntarily underemployed. We quickly determined that this argument was without merit.[5]

Contrary to Father's assertion, "litigants may prove elements of their own case during the cross-examination of their opponent's witnesses." *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999); *see* Tenn. R. Evid. 611(b) (which states that "[a] witness may be cross-examined on any matter relevant to any issue in the case"); *see also Sands v. Southern Ry. Co.*, 64 S.W. 478, 479-480 (Tenn. 1901) (holding that testimony elicited on cross-examination, which was not strictly germane to the examination in chief, is original evidence). Accordingly, Mother may prove through cross-examination of Father during his case-in-chief, and without presenting any evidence in her case-in-chief, that he was voluntarily underemployed.

Finding of Voluntary Underemployment

Father contends that the trial court abused its discretion in ruling that Father was not entitled to have his child support obligation suspended or reduced after presenting evidence of his involuntary termination of employment, his attempts to obtain employment, and his decision to practice law as a solo practitioner. Essentially, Father challenges the court's finding of voluntary underemployment.

Under Tennessee law, there is no presumption that a parent is willfully or voluntarily underemployed or unemployed. To the contrary, the party alleging that a parent is willfully or voluntarily underemployed or unemployed carries the burden of proof. Tenn. Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii) (2008) ("The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed."); *Richardson v. Spanos*, 189 S.W.3d 720, 727 (Tenn. Ct. App. 2005). Consequently, Mother had the burden of demonstrating that Father was willfully or voluntarily underemployed. Having deemed that the law provides that Mother can prove her case by cross-examination, we will examine the evidence upon which the trial court found that Father was voluntarily underemployed.

A party's child support obligation is not measured by his actual income; it is measured by his earning capacity as evidenced by his educational level and previous work experience. Tenn.

[5] At oral argument, all three judges on the panel independently informed the appellant that his argument was without merit.

Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii); *Watters v. Watters*, 22 S.W.3d 817, 820-21 (Tenn. Ct. App. 1999).[6] When called upon to determine whether a parent is willfully and voluntarily unemployed or underemployed, the courts will consider the factors in Tenn. Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii), as well as the person's past and present employment and reasons for the party's change in employment. *Richardson*, 189 S.W.3d at 726 (citing *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003); *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002)); *see also Watters*, 22 S.W.3d at 823.[7]

Determining whether a parent is willfully and voluntarily underemployed and what a parent's potential income would be are questions of fact that require careful consideration of all the attendant circumstances. *Richardson*, 189 S.W.3d at 726 (citing *Eldridge*, 137 S.W.3d at 21; *Willis*, 62 S.W.3d at 738-39). Thus, this court reviews a trial court's determination regarding willful and voluntary underemployment using Tenn. R. App. P. 13(d) and accords substantial deference to the trial court's decision, *Willis*, 62 S.W.3d at 738, especially when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses. *Richardson*, 189 S.W.3d at 726 (citations omitted).

The trial court provided a lengthy explanation for its ruling on the issue of voluntary underemployment. The court found that Mother had demonstrated that Father was underemployed because Father has a law degree, a Master's degree in business education, and significant technical training. The court also found that he was articulate and capable of earning an income in the range of $45,000, which was the amount upon child support was originally set.

Determining whether Father was voluntarily underemployed and his earning capacity are questions of fact that are dependent upon all attendant circumstances. *Richardson*, 189 S.W.3d at 726; *Eldridge*, 137 S.W.3d at 21; *Willis*, 62 S.W.3d at 738-39. The trial court found that Father was voluntarily underemployed and that his earning capacity was the same as it was when child support was established. The evidence in the record does not preponderate against the trial court's findings. Accordingly, we affirm the findings of the trial court.

Child Support Obligation for Period During Which Child Stayed with Father

Father contends the trial court erred because it refused to suspend Father's child support during the summer months when the child is with Father for eight consecutive weeks. We find this

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[6]The Guidelines were amended in 2006. Thus, although many cases refer to Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(2005), the new regulations found at Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(a)(2)(ii)(2006) are essentially the same.

[7]If a parent's reasons for working in a lower paying job are reasonable and in good faith, the court will not find him or her to be willfully and voluntarily underemployed. *Richardson*, 189 S.W.3d at 726 (citing *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001)). The courts are particularly interested in whether a parent's change in employment is voluntary or involuntary, *Eldridge*, 137 S.W.3d at 21, and are more inclined to find willful and voluntary underemployment when a decision to accept a lower paying job is voluntary. *Richardson*, 189 S.W.3d at 726 (citing *Demers*, 149 S.W.3d at 69).

argument to be without merit because the amount of time the child was with the Father was taken into account when his child support obligation was established in 2005.

The Tennessee Child Support Guidelines have mandatory Child Support Worksheets to be used to calculate child support based on the parents' gross income for the year and payable for each month. Tenn. Comp. R. & Regs. § 1240-2-4-.08. Pursuant to the regulations, each parent enters into the Worksheet the number of days the child will spend with each parent. Tenn. Comp. R. & Regs. § 1240-2-4-.08(2)(a)(1). A presumption arises from this mandatory rule that the annual child support obligation is prorated over a twelve-month period of time and takes into consideration that a parent may have possession of the child for a consecutive period of time. Furthermore, at oral argument, Father admitted that the number of days the child resided with him was taken into account and "plugged into the computer" when Father's original amount of child support was established in 2005. We, therefore, find this issue without merit.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Deon Devall Owensby

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FRANK G. CLEMENT, JR., JUDGE